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In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1948

No. 444

PUEBLO TRADING CO. (a corporation),
Petitioner,

vs.

EL CAMINO IRRIGATION DISTRICT (a public corporation); B. A. OSBORN, S. E. AYER, J. P. BURTON, WALTER MAYES and WALTER BUNTING, Members of the Board of Supervisors of Tehama County, and W. E. ROCHFORD, Assessor of Tehama County, California,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit made in the above entitled cause on July 26, 1948. (R. 45.)

An order denying a petition for rehearing was filed in the Circuit Court September 7, 1948. (R. 46.)

OPINION BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is cited at 169 Fed. (2d), page 312, and found in the Transcript of Record at page 38. The concurring and dissenting opinion of Denman, Circuit Judge, is found at page 41 and the dissenting opinion of Denman, C. J., on denial of petition for rehearing is found at page 47.

JURISDICTION.

The judgment in the United States Court of Appeals was rendered July 26, 1948, and the rehearing was denied September 7, 1948. (R. 45, 46.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U.S.C.A. par. 347(a)).

STATUTES INVOLVED.

The principal California statute involved is "the California Irrigation District Act," Cal. Stats. 1897, page 254, as amended and which is now incorporated into the Water Code of California, Division 11, pertinent portions of which are set forth in Appendix A.

There are also involved Rules 81(b) and 69 of Federal Rules of Civil Procedure.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Pueblo Trading Co., a Nevada corporation, brought suit against the El Camino Irrigation District, a public corporation, being an irrigation district organized under "the California Irrigation District Act," Cal. Stats. 1897, page 254, as amended, now being Division 11, Water Code of the State of California, located in Tehama County, California, in the Northern District of California, Northern Division. The action was brought to collect $53,000 principal amount of interest-bearing bonds issued by the El Camino Irrigation District, together with interest and such other relief as might be proper. (R. 2-5.) The complaint was served upon the El Camino Irrigation District January 10, 1945 (R. 6), which defaulted in the action, whereupon a judgment was entered by the Court on February 13, 1945 (R. 8), awarding plaintiff $53,000 principal, $18,181.65 interest and $19.00 costs (R. 7) and the judgment contained the further provision:

> "It Is Further Ordered that the defendant El Camino Irrigation District make provision for

the payment of this judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided under the provisions of Division 11 of the Water Code of the State of California, and that upon the failure or refusal of the defendant and its officers to make such provision, that the Board of Supervisors and other officers of the County of Tehama, State of California, make provisions for the payment of this judgment by levying and collecting assessments against the lands in said district in the manner provided by the said Division 11 of the Water Code of the State of California, and that for that purpose this Court retain jurisdiction of the cause and that the plaintiff may apply to the Court for such further relief as may be appropriate to obtain satisfaction of the judgment." (R. 7.)

This provision is at the center of the controversy.

The statute makes it the duty of the board of directors of the irrigation district to levy assessments to pay judgments (Secs. 25650, 25652(d), Water Code of California. See Appendix A) and upon its failure so to do it becomes the duty of the Board of Supervisors of the County. (Sec. 26500, Water Code of California. See Appendix A.)

Certified copies of the judgment were served upon the directors of the El Camino Irrigation District August 28, 1946, and September 27, 1946. (R. 9, 11.)

Certified copies of the judgment were also served upon the District Attorney of Tehama County and

the Assessor on September 5, 1946, and the Treasurer September 12, 1946 (R. 10), and upon the members of the Board of Supervisors of Tehama County, respondents herein, on August 19, 1946. (R. 11.) In January, 1947, a written notice and demand was also made upon the Board of Supervisors advising the board of the failure of the irrigation district to levy assessments for the purpose of satisfying the judgment and calling their attention to the fact that certified copies of the judgment had been served upon the Board of Supervisors, and demanding that the Board forthwith levy an assessment as provided in the judgment for the purpose of satisfying the same, and advising if the board of supervisors should continue to fail to make such levy application would be made to the Federal Court for an order citing the board for contempt.

The notice also called to the attention of these officers that not only the judgment required them to make the levy but that also the law of the State of California so required. (R. 15, 24, 25.)

Section 26500 of the Water Code of the State of California requires the Board of Supervisors to make the levy in question. This section reads as follows:

> "If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board."

The pertinent sections of the Water Code requiring the Board of Directors of the Irrigation District to make such levy is as follows:

> "Sec. 25650. Each district by its board each year within 15 days after the close of its session as a board of equalization shall levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following:
>
> * * * * * * *
>
> "Sec. 25652. The annual assessment shall also include a levy sufficient to pay all of the following:
>
> * * * * * * *
>
> "(d) (Obligations reduced to judgment.) All obligations of the district which have been reduced to judgment."

Application was made to the District Court by the plaintiff Pueblo Trading Co. July 7, 1947, for an order. (R. 14-16.) This application requested the Court to issue an order to show cause why the supervisors and officers of the County of Tehama should not be punished for contempt of court for failure to carry out the order of the Court, and that such further order should be made in the premises as would insure provision for payment of the judgment by levy and collection of taxes and assessments on the lands in the district as provided by law. (R. 15.)

Thereupon the Court issued its order dated July 7, 1947 (R. 12, 13), citing the officers named to show cause before the Court why they should not be punished for contempt for disobedience of the judgment entered February 13, 1945, and why such further

order in the premises should not be made as would insure the levy and collection of assessments for the satisfaction of the judgment. (R. 12, 13.)

The supervisors and officers of Tehama County made return to the order to show cause by demurrer (R. 18), supported by affidavit. (R. 19.)

The demurrer was made on the grounds that (1) the judgment went beyond the complaint in that it directed the levy of assessment; (2) that neither the county nor any of its officers were made parties to the proceeding, or brought before the Court in any process; (3) that the plaintiff had failed to pursue the remedy alleged to be provided by Secs. 26550 to 26553 of the Water Code of the State of California.[1]

While not stated in the demurrer, in their affidavit the respondents contended that the Board of Supervisors and officers of Tehama County were of the opinion that it would be inequitable to levy an assessment for the judgment, and cited in support the cases of *El Camino Land Corporation v. Board of Supervisors of Tehama County,* 43 Cal. App. (2d) 351, and *City of Asbury Park v. Christmas,* 78 Fed. (2d) 1003. (R. 20.)

The Order to Show Cause came on for hearing before the District Court on the pleadings referred to above, whereupon the Court made an Opinion and Order dismissing the proceedings entirely on September 23, 1947. (R. 27-29.)

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[1]These sections are set forth in the Appendix A, but this point was not pressed.

The District Court in its opinion just referred to held that as the Board of Supervisors were not parties to the action the Court had no jurisdiction over them, and having no jurisdiction they could not be held in contempt, and distinguished one of the cases relied upon by the plaintiff Pueblo Trading Co. (*Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860), stating in the opinion:

> "That case is clearly distinguishable from ours. There a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the board of supervisors to make a levy sufficient to satisfy the judgment. In the second action the board of supervisors was afforded due process. The members of the board were parties to that action. They could there present any legal defense." (R. 28.)

The District Court made no comment whatever upon that part of the application in the order to show cause which referred to further proceedings to require the assessment.

The United States Court of Appeals by the majority opinion sustained the Court below and gave no consideration whatever to that alternative portion of the application and of the order to show cause which was for the purpose of providing that whether or not the parties were found guilty of contempt, provision for the assessment should be made. Mr. William Denman, Chief Judge, concurred in the order of the Court dis-

missing the contempt proceeding, but dissented from that part of it which ignored the order to show cause why the levy should not now be made, and pointed out that the federal Court has no power to issue a writ of mandate, but may entertain, as here, ancillary proceedings in the form of an order to show cause, for the purpose of enforcing the levy of assessment, as was done in the case of *Board of Supervisors v. Thompson,* 122 Fed. 860, 862 (C. A. 9).

The chief judge was even more emphatic in his dissenting opinion filed upon the denial of the petition for rehearing (R. 47), wherein he said:

> "The petition for rehearing should be granted. If the language of the order to show cause 'why such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein' does not provide for an ancillary proceeding for execution of appellant's judgment, no language can provide for such execution. If this be the law, the appellant's judgment is unenforcible by execution and is destroyed."

QUESTIONS PRESENTED.

Where a party to litigation has obtained a money judgment against a public agency as to which no writ of execution will issue (*El Camino Irrigation District v. El Camino Land Corporation,* 12 Cal. (2d) 378, 85 Pac. (2d) 123) is it not necessary that the judgment should provide in accordance with the language of

Rule 69 of the Federal Rules of Civil Procedure for the method of enforcement of the judgment? And is it not proper therefore that judgment in such a case as the instant one should provide for satisfaction of the judgment by the process of levying an assessment rather than by the process of execution upon the property of the district?

2. Where such a judgment has been obtained by default in a stated sum and execution will not issue, is not a provision in the judgment requiring the officers of the state to execute the judgment by means of assessment as provided by the law mere civil process for collection of the judgment so that the officers whose duties it is to perform the various acts in levying the assessment are no more necessary parties to the judgment than the clerk and marshal would be with relation to the issuance and levy of a writ of execution?

3. For inasmuch as Rule 81(b) of Federal Rules of Civil Procedure abolishes writs of mandate and provides that the relief of a writ of mandate may now be obtained by appropriate action or by appropriate motion under the practice prescribed in those rules, and for inasmuch as Rule 69 provides that process to enforce a judgment for the payment of moneys shall be by writ of execution, unless the Court otherwise directs, is it not proper federal practice, after the obtaining of a judgment, to issue an order to show cause upon a verified application directed to the board of supervisors or other appropriate officials requiring

them as in this case to show cause "why such further order in the premises should not be made as will ensure the levy and collection of assessments for the satisfaction of the judgment herein" and under such circumstances should the District Court refuse to entertain such application?

4. Where return has been made to such Order to Show Cause raising equitable defenses but offering no evidence in support thereof should not the judgment requiring the levy stand, or a new one be entered?

REASONS RELIED ON FOR GRANTING THE WRIT OF CERTIORARI.

I. The petitioner obtained a money judgment against the respondent El Camino Irrigation District, a public corporation of the State of California. Under the law of California no writ of execution can issue against the district's property, and the only method of satisfaction of such judgment is by the levy and collection of assessments. California statutes require the board of directors of such an irrigation district to levy assessments for satisfaction of a judgment against it. The statutes also require the board of supervisors of the county to levy such assessments in the event the irrigation district board should fail to do so.

The judgment in this case was by default, the judgment providing that it should be collected by levy of assessment by the respective boards. The board of

supervisors of the county were not parties to the action and were not served with original process. But having been served with certified copies of the judgment and having been notified of the failure of the irrigation district board to levy the assessment and a demand made for such levy, an order to show cause was obtained from the Court citing the board for contempt of court, and requiring also that the board show cause why it should not now levy such assessment. The board, having appeared, pleaded particularly that they were not parties to the action, and the Court thereupon dismissed the proceedings.

It is maintained by the petitioner that the Court has decided an important question of federal law with relation to process and judicial procedure, which has not but should be settled by this Court and that it has sanctioned a departure from the accepted and usual course of judicial proceedings by the lower District Court so as to call for an exercise of this Court's power of supervision. We most respectfully submit in the language of the dissenting opinion of Chief Judge William Denman that if the order to show cause "why such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein" does not provide for an ancillary proceeding as provided in Federal Rules of Civil Procedure, no language could so provide. And if this be the law therefore, as the Chief Judge points out, appellant's judgment is void and unenforceable.

Furthermore, we respectfully contend that the requirements of due process were fully sustained by the service upon the officers of the certified copies of the judgment and the order to show cause, and that they not only had an opportunity to appear and be heard but did appear and offered their defense, and having offered nothing in support of their position that they should not be required to levy an assessment, the usual and accepted course of judicial proceedings requires that an order be made requiring them to proceed with the assessment.

Wherefore, petitioner Pueblo Trading Co. prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court in the case numbered and entitled in its docket No. 11798, Pueblo Trading Co., a corporation, Appellant, vs. El Camino Irrigation District (a public corporation); B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and Walter Bunting, Members of the Board of Supervisors of Tehama County, and W. E. Rochford, Assessor of Tehama County, California, Appellees, and that the decree of said Court be reversed by this Court with directions to require the District Court to enter an order requiring the levy and collection of an assessment for the satisfaction of the judgment of the Pueblo Trading

Co., and for such other relief as to this Court may seem proper.

Dated, Turlock, California,
November 22, 1948.

PUEBLO TRADING CO.,
By E. B. DELBON, Secretary,
Petitioner.

W. COBURN COOK,
Counsel for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FACTUAL BACKGROUND OF THE CASE.

A statement of the facts surrounding the case is made in the preceding petition.

I. FIRST POINT. DUE PROCESS DOES NOT REQUIRE THAT THE BOARD OF SUPERVISORS OF TEHAMA COUNTY SHOULD BE PARTIES TO THE ACTION. THE JUDGMENT REQUIRING THE SUPERVISORS AND ASSESSOR TO LEVY AN ASSESSMENT TO SATISFY THE JUDGMENT WAS IN THE NATURE OF EXECUTION OF THE JUDGMENT, AND THE OFFICERS INVOLVED WERE NOT NECESSARY PARTIES TO THE ACTION, MERELY BECAUSE THE SATISFACTION OF THE JUDGMENT MIGHT REQUIRE THEIR ACTION.

No writ of execution can be levied against the property of an irrigation district. (*El Camino Irrigation District v. El Camino Land Corp.*, 12 Cal. (2d) 378, 85 Pac. (2d) 123.

In federal Courts the former practice was to obtain a judgment against the district and then to obtain a writ of mandate to compel levy of assessment. Under the former practice these writs of mandate were obtained in supplemental proceedings. (*Thompson v. Perris Irrigation District*, 116 Fed. 769; *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860.)[2]

As stated in those two decisions, mandamus is a proper remedy for collecting a judgment against an irrigation district in California.

The writ was not a new suit but merely process essential to jurisdiction and substituted for execution to enforce the judgment. Furthermore, it was held in *Riverside County* case that the judgment determined all questions that might have been litigated and also all questions that were actually litigated, and deter-

[2]Another case in this litigation is *Perris Irrigation District v. Thompson*, 116 Fed. 832.

mined those matters for the parties, not only before the Court, but for all parties who might thereafter under the law be called upon in a proceeding in the nature of an execution to enforce the judgment therein obtained.

The basis for the issuance of the writ of mandate was California Statutes 1897, page 254 (Sec. 39 of the California Irrigation District Act), now Sections 25650 and 25652 of the Water Code, and which provides that the Board of Directors of the irrigation district shall "levy an annual assessment upon the lands within the district in an amount sufficient to raise * * * all obligations of the district which have been reduced to judgment."[3]

Section 26500 of this Code provides that if the Board of Directors neglect or refuse to make the assessment "the board of supervisors of the office county shall * * * perform the duties of the board of the district * * *"

Thus the officers of the county are in effect made officers of the irrigation district to carry out the tax process. (See Appendix A.)

The Federal Rules of Civil Procedure, Rule 81(b) provide for the abolition of writs of mandate and provide that the relief of a writ of mandate may now be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules. Rule 69 provides:

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[3]The bonds appear to have been issued under the former Wright Act, Stat. Cal. 1887, p. 29 (116 Fed. 832, 3).

> "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise."

It therefore appears that unless the Court had directed otherwise in the judgment, the plaintiff would have been limited to a writ of execution, and insomuch as writs of mandate have been abolished, it would appear that the Court took the proper course in providing *otherwise* in the judgment, and this it did in providing for the collection of the judgment by the method provided by the Water Code of the State of California, namely, levy of assessment.

In *Board of County Commissioners of Labette Co., Kansas v. U. S.,* 112 U. S. 217, 5 S. Ct. 108, it is held that mandamus can be exercised against persons who are not parties to the judgment sought to be enforced. See also *U. S. v. County Court of Knox Co.,* 122 U. S. 306, 7 S. Ct. 1171, where the Court affirmed the decision in the above case, saying:

> "The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity as well as the county itself, * * *"

This last case holds that the Court has jurisdiction to enforce a judgment entered by the Court by mandamus against persons who are not parties to the judgment sought to be enforced.

In the case of *Stewart v. Salamon,* 97 U. S. 361, this Court said:

> "This is an appeal from a decree entered upon our mandate. No complaint is made as to its form

and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate. The appeal is dismissed with costs."

It was contended that the proceeding for the writ was entirely new and independent of the action upon which the judgment was obtained. The case of *Riggs v. Johnson County*, 6 Wall. 166, disposes of this point:

"The writ of mandamus in the case like the present one is a writ in aid of jurisdiction, which has previously attached, and in such case it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract. * * * When so employed it is neither a prerogative writ nor a new suit in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same."

In *State of Arkansas v. St. Louis-San Francisco Ry. Co.*, 269 U. S. 172, 46 S. Ct. 66, it is held where a judgment was obtained against a county, the district Court had jurisdiction to compel the assessing officers of the county to levy a tax for the purpose of securing satisfaction of this judgment.

A leading case is one of the Ninth Circuit, *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 860. A judgment had been obtained against the irrigation district in question and the Court held that this judgment was conclusive as to all matters that might have been litigated in the action, so far as the board of supervisors of the county was concerned, and that the board might be compelled in supplemental proceedings to make the levy by mandamus. The Court, after citing the California statutes, said:

> "By this statute it is made the plain duty of the board of supervisors to make the levy required by the act in case of the neglect or refusal of the board of directors to cause such assessment and levy to be made. But it is objected that the board of supervisors and the interveners were not parties to the former action, and were, therefore, not precluded by the judgment, and that they now have the right to make herein all the defenses which could have been made to the original action. We cannot assent to this contention. *The judgment in the former action established the right of the defendant in error against the irrigation district. All the necessary parties to that action were before the court, and there was no defect of parties defendant.* The present proceeding is not a new action to establish the rights of

the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce the judgment already rendered. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment, as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris Irrigation District can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action.

"The point is made that no notice or demand was given the board of supervisors before filing the petition for the writ of mandamus. The statute does not require such notice. The petition was notice." (Emphasis ours.)

The District Judge refers to the case of *Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860, and says:

"That case is clearly distinguishable from ours. There a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the board of supervisors to make a levy sufficient to satisfy the judgment. In the second action the board of supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense." (R. 28.)

We have examined the record on appeal in this case in the files of the Ninth Circuit Court of Appeals, where the case is numbered 912. We think there is some misunderstanding of the *Thompson* case. There were not two actions but only one. The members of the Board of Supervisors were not made parties to any suit. They asked to intervene. What really happened was that a judgment was obtained against the Perris Irrigation District on the bonds in question. At that time a district Court could issue a writ of mandate. So the plaintiff Thompson asked the Court to issue a writ of mandate and an alternative writ was issued September 18, 1901. Thompson in his brief in this case goes to considerable length to emphasize the fact that there is only one action and not two actions. He emphasizes that in the lower Court all papers bore the number 849. Perris Irrigation District was the district involved. Probably the difference in names of the parties has brought confusion not only to the Court when the original case was heard but to the Court below in the instant case. The defense raised by the Board of Supervisors in their answer was stricken by the lower Court and the judgment of that Court was affirmed. Consequently it would appear that the *Thompson* case determines that the Board of Supervisors are not proper parties and did not have the right to litigate the matter after a judgment has been entered against an irrigation district.

R. H. Thompson, plaintiff, asked for a judgment against the district in the amount of $6405 with interest and costs upon certain bonds and coupons. The case was then appealed to the Ninth Circuit Court of Appeals and judgment was affirmed May 5, 1902. Thompson filed a petition for writ of mandate to compel the supervisors to levy an assessment in the same action. This petition showed that some kind of a request had been made to the Board of Supervisors to levy the assessment. In our case like request was made of the Board of Supervisors. The supervisors refused to make the levy.

That is exactly the situation in the instant case where an application for an order to show cause was made by plaintiff Pueblo Trading Co. and an order to show cause issued. The application in the instant case prayed for an order to be issued, citing the supervisors to show cause why they should not be punished for contempt, and that such further order be made as would insure provision for payment of the judgment by levy and collection of taxes and assessments on the lands. (R. 15.) The judge below in the instant case in his order dismissed the entire proceeding and granted no relief. (R. 27, 29.)

An order was made in the *Thompson* case denying a motion to quash the mandate. The judge's opinion on this order is quite significant. The judge said, referring to the writ of mandate, "When so employed, the writ is not a new suit but simply a process essential to jurisdiction, and a substitute for execution to

enforce the judgment," citing *United States v. Johnson County*, 6 Wall. 193, 18 L. Ed. 775, and *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781. (R. 95.)

Knox County v. Aspinwall, 24 Howard 376, 16 L. Ed. 735;

Mayor v. Lord, 76 U. S. 409, 19 L. Ed. 704;

United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 227;

United States v. Knox County, 122 U. S. 306, 30 L. Ed. 1152, 7 S. Ct. 1171;

Chanute City v. Trader, 132 U. S. 210, 33 L. Ed. 345, 10 S. Ct. 67;

Labette County Commrs. v. U. S., 112 U. S. 217, 28 L. Ed. 698, 5 S. Ct. 108.

On appeal the supervisors contended: "The Board of Supervisors was not a party to the original action to recover on the bonds, nor were the members of the board of directors of that district."

The motion to quash and demurrer were disallowed by the Court. (116 Fed. Rep. 770.) Thompson contended that the Board of Supervisors had no right to contest the proceedings. He contended that the only facts which it was permissible in this proceeding to have shown were such facts as may have occurred subsequently to the affirmation of the case by the Circuit Court of Appeals.

It conclusively appears that there was no separate action against the Board of Supervisors.

SECOND POINT: THE APPELLEES WERE AFFORDED DUE PROCESS.

It goes without saying, of course, that there is no lack of process insofar as El Camino Irrigation District is concerned.

Now the laws relating to irrigation districts impose upon certain officers certain duties. The officers upon whom duties are imposed are of course in the first instance the officers of the district itself and the board of directors is required by statute to levy assessments to satisfy not only its obligations but its bonds and the judgments against it as well.[4] Sections 26500 and 26501 of the Water Code also in effect create other officers of the district or impose upon certain public officers certain duties in relation to the irrigation district. (See Appendix A.) By these provisions of the Water Code the Board of Supervisors and assessor in effect become officers of the irrigation dis-

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[4]Water Code, Section 25652, provides: "The annual assessment shall also include a levy sufficient to pay all of the following:

* * * * * * *

(d) All obligations of the district which have been reduced to judgment."

Section 25650 provides: "Each district by its board each year within 15 days after the close of its session as a board of equalization shall levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following:

(a) Interest due or that will become due on all outstanding bonds of the district and interest which the board believes will become due on district bonds authorized but not sold, all respectively before the close of the next ensuing calendar year.

(b) Principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year.

To the extent that provision is otherwise made as permitted by law for the payment of bond principal and interest, levies for principal and interest pursuant to this section need not be made.

trict and are required to satisfy the liabilities based upon bonds and other contracts and the liabilities created by judgments. All of this is independent of the order of the Court itself.

Rule 81(b) of Federal Rules of Civil Procedure provides for the abolition of writs of mandate and that Section 69 of the rules also provides and directs that the process to enforce a judgment for payment of money shall be by writ of execution unless the Court directs otherwise. Thus it appears that this could be and probably should be by the judgment itself.

We submit we have shown that even a writ of mandate is mere process in substitution for a writ of execution.

That being the case no new suits and no new procedures were necessary. The judgment coupled with the order to show cause was sufficient process to advise the respondents of the demands of the petitioner to bring them into Court and give them their "day in Court." The Court's order to show cause was in the alternative so to speak and contemplated that the Court would proceed to take steps to ensure the levy of the assessment. Instead the Court abruptly dismissed the entire proceeding.

The respondents appeared and *defended.* They raised defenses which only a party could raise:

(1) That the order of assessment was not asked for in the complaint.

(2) That the plaintiff had not pursued other available remedies.

(3) That the assessment would be inequitable.

(4) That it was too late to make the assessment when the judgments were served upon them.

They had their day in Court—one to which they were not entitled (*Thompson* case).

THIRD POINT: THE COURT ERRED IN NOT REGARDING ITS ORDER TO SHOW CAUSE AS PROCESS UNDER RULE 81(b) OF FEDERAL RULES OF CIVIL PROCEDURE.

The judgment entered by the Court provided:

> "It is further ordered that the defendant El Camino Irrigation District make provision for the payment of this judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided under the provisions of Division 11 of the Water Code of the State of California, and that upon the failure or refusal of the defendant and its officers to make such provision, that the Board of Supervisors and other officers of the County of Tehama, State of California, make provision for the payment of this judgment by levying and collecting assessments against the lands in said district in the manner provided by the said Division 11 of the Water Code of the State of California, and that for that purpose this Court retain jurisdiction of the cause and that the plaintiff may apply to the Court for such further relief as may be appropriate to obtain satisfaction of the judgment." (R. 7.)

Let it be remembered that no writ of execution can be levied against the property of an irrigation district. *El Camino Irrigation District v. El Camino Land Corporation,* 12 Cal. (2d) 378, 85 Pac. (2d) 123.

The Court itself had made an order providing that the Court would consider an appropriate order for the levy of an assessment, for the order to show cause was issued to show why "such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein."

The Court should, if it was correct in dismissing the contempt proceedings, have construed the order to show cause as a proceeding under Rule 81(b) of the Federal Rules of Civil Procedure and proceeded to require the levy of the assessment. This rule reads as follows:

> "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

The Court's decision that it had no jurisdiction to proceed in the matter amounted to a declaration that the rule in question was unconstitutional as applied to the situation here.

Where the Court in any particular action between parties has obtained possession of property or has something between the parties which it has to carry out, it would seem that any party interested could be

brought in by some form of notice without being made a party to the action and if such party has any interest in or legal objection it can raise its objection to the process.

The cases of *Morgenthau v. Barrett,* 108 Fed. (2d) 481, and *Levine v. Farley,* 107 Fed. (2d) 186, indicate that the Courts will grant some form of relief under this rule.

We urge that we have amply shown in our statement of the case above that all of the parties were duly notified, not only of the entry of the judgment, but that demand was made for the levy of the assessment, and of course they were duly notified of the hearing on the order to show cause, and they appeared and set forth specific defenses on the grounds of equity, and the decision in the *El Camino* case, supra.

It would therefore appear that unless the relief sought in this case is granted the petitioner will be denied the equal protection of the laws and the Courts for satisfaction and protection of its interests, that its property will be substantially taken from it without due process of law. Furthermore ample notice had been given to the respondents of the proceedings and we submit the Court should have entered an order requiring them to levy an assessment if it did not choose to hold them guilty of contempt. They had the same opportunity afforded the supervisors in the *Thompson* case to object or raise any defense even by intervention if proper. Quite obviously the purpose

of the plaintiff and petitioner is not to punish officials but to secure satisfaction of the judgment.

FOURTH POINT: CALIFORNIA LAW AS INTERPRETED IN THE CASE OF EL CAMINO LAND CORPORATION v. BOARD OF SUPERVISORS OF TEHAMA COUNTY, 43 CAL. APP. (2d) 351, 110 P. (2d) 1076, DOES NOT SUPPORT THE ORDER OF THE DISTRICT COURT IN DISMISSING THE PROCEEDINGS.

Respondents relied upon the case of *El Camino Land Corporation v. Board of Supervisors of Tehama County,* 43 Cal. App. (2d) 351, 110 Pac. (2d) 1076, as a ground for refusing a levy of an assessment for the judgment in this case.

This case merely held that the issuance of a writ of mandamus is discretionary with the Court. The Court said (page 1079):

> "We are of the opinion that under the law as we have stated it, the facts found by the court were sufficient to invoke its legal discretion in favor of denying the writ."

In the instant case the Court did not exercise its discretion in such manner in entering the judgment and furthermore it is not certain that it could have so done. This is a matter of procedural law. At any rate the respondents had ample opportunity to appear before the Court and plead their cause. This they did not do.

It will be noted that the respondents further than referring to the case of *El Camino* (supra) introduced no evidence and made no effort to substantiate a claim

for the use of discretion and set forth no facts which would make it inequitable or improper that the judgment should not be collected forthwith by the levy of taxes and assessments. In any event the *El Camino* case involves bonds and not judgments.

FIFTH POINT: UNLESS THIS HONORABLE COURT REVERSES THE JUDGMENT BELOW PLAINTIFF'S JUDGMENT WILL BE UNENFORCEABLE AND DESTROYED.

This is the gist of both opinions of the Chief Judge William Denman. As these two opinions present strong argument in favor of reversal on the ground that the application and order to show cause was proper procedure under the Federal Rules of Civil Procedure to obtain enforcement of the judgment we will quote those opinions in full, and they are as follows:

CONCURRING AND DISSENTING OPINION

"I concur in the affirmance of the order of the district court which reads 'The contempt proceeding is dismissed,' but dissent from the court going afield from the single issue presented by the appeal from that order and erroneously denying the right to appellant bondholder to have considered its plea for execution on the judgment of the court below in the ancillary mandamus proceeding it brought.

The punishment for a past contempt is an entirely distinct proceeding from the mandamus proceeding sought requiring future action.

This mandamus proceeding was prayed for in that portion of the motion for an order to show cause which reads, 'that such further order be made in the premises as will insure provision for payment of said judgment by levy and collection of taxes and assessments on the lands of said district as provided by law.' The district court recognized that this ancillary relief so was sought and in its order to show cause ordered cause be shown 'why such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein.'

The district and the supervisors and the assessor of Tehama County recognized this as an ancillary proceeding in mandamus in the nature of an execution and in their pleading in opposition alleged in their defense the following facts:

'That the Board of Supervisors and the officers of Tehama County are of the opinion that it would be inequitable to levy an assessment based upon this judgment of $50,000.00 when as a matter of fact, there are other outstanding bonds and interest on bonds in a far greater sum than is involved in this suit.

'That in their opinion to levy an assessment at this time for the entire outstanding indebtedness would fly directly in the face of the controlling law on this subject as announced in the case of El Camino Land Corporation v. the Board of Supervisors of Tehama County, 43 Cal. App. 2nd, 351, and City of Asbury Park vs. Christmas, 78 Fed. 2nd, 1003, in which cases the Court held Writs of Mandate were denied solely because to have en-

acted the assessment would have produced economic chaos and would have been inequitable.

'Wherefore your affiant prays that the Order to Show Cause heretofore issued in the above entitled matter be denied.'

Issue was thus joined on the motion for such ancillary execution. So far as we are advised that proceeding is still pending before the lower court. I am unable to understand why an issue so joined becomes no issue at all by applying the word 'peremptory' as used in the second footnote to the court's opinion.

On the appeal here it was agreed that there were two matters before the lower court, one for the past contempt decided by the above order and another for future action, the mandamus proceeding for execution of the judgment in favor of the bondholder. The brief of the district and county officers argues that the relief by ancillary mandamus should not be granted, not because it was not at issue before the court but because 'Section 26553 of the Water Code provides a remedy for the enforcement of the levying and collection of assessments. Pursuant to this section appellant should have made a complaint to the Attorney General of the State of California. Until appellant has exhausted its legal remedies, it is not entitled to relief by mandamus. City of San Diego v. Andrews, 195 Cal. 111, 120, 231 Pac. 736; McMurtrey v. Clark, 157 Fed. 2d 703, 704.' Neither of the cases cited is a contempt proceeding.

Their brief again recognizes the difference between the contempt portion and the mandamus

portion of the relief sought by the bondholder and concludes with the following: 'It is respectfully submitted that the Court below did not err in dismissing the contempt proceeding.

'The members of the board of supervisors and the county assessor respectfully request that the Court do not make any order requiring them to levy an assessment pursuant to the applicable provisions of the Water Code of the State of California, unless the Court has first afforded them an opportunity to present the material facts regarding the levy and has carefully considered those facts.' (Emphasis supplied.)

It has long been established that the federal courts have the power to grant execution of such a bondholder's judgment against such officers but not, as has been contended, by a plenary mandamus proceeding.

Unlike the State of California, where the trial courts have the power to issue the writ of mandamus in a plenary suit against the district, the federal court has no power to entertain such plenary proceedings. This has been held in a long line of cases beginning with Bath County, Kentucky v. Amy, 13 Wall. 244, 249, 250-251, followed by Heine v. The Levee Commissioners, 19 Wall. 660, 665, and Rosenbaum v. Bauer, 120 U. S. 450, a diversity case from the State of California, citing many other cases to the same effect. That the federal courts in a diversity proceeding such as this have the power in an ancillary proceeding to issue the writ as a form of execution for the bondholder's judgment is held in Riggs v. Johnson County, 6 Wall. 166, 198.

In Meyers v. City of Eufaula, Oklahoma, 132 F. 2d 648, 652 (CCA 10), the distinction between the state's plenary and federal ancillary mandamus proceeding is fully stated. See also Huddleston v. Dwyer, (Oct. 25, 1944), 145 F. 2d 311, 315. This circuit so held in Board v. Thompson, 122 Fed. 860, 862 (CCA 9).

In such an ancillary proceeding the board of supervisors and the county officers served, as here, with such an order to show cause, may present such defenses as in the cases of El Camino Land Co. v. Board of Supervisors of Tehama County, 43 Cal. App. 2d 351, and City of Asbury Park v. Christmas, 78 F. 2d 1003, and such other defenses under the California statutes or otherwise they deem advisable."

DISSENTING OPINION OF DENMAN, C. J., ON DENIAL OF PETITION FOR REHEARING

"The petition for rehearing should be granted. If the language of the order to show cause 'why such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein' does not provide for an ancillary proceeding for execution of appellant's judgment, no language can provide for such execution. If this be the law, the appellant's judgment is unenforcible by execution and is destroyed.

WILLIAM DENMAN,
Chief Judge, United States Court of Appeals for the Ninth Circuit."

CONCLUSION.

It is respectfully submitted that a writ of certiorari should issue to the Court below and that its judgment sustaining the order of the District Court should be reversed with specific directions requiring the District Judge to enter an order requiring the board of supervisors and officers of Tehama County, California, to levy and collect assessments to pay the judgment of the plaintiff.

Dated, Turlock, California,
November 22, 1948.

Respectfully submitted.
W. COBURN COOK,
Counsel for Petitioner.

(Appendix A Follows.)

Appendix A

Water Code of the State of California:

Section 25650. Each district by its board each year within 15 days after the close of its session as a board of equalization shall levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following:

* * * * * * *

Section 25652. The annual assessment shall also include a levy sufficient to pay all of the following:

* * * * * * *

(d) All obligations of the district which have been reduced to judgment.

Section 26500. If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.

Section 26501. The applicable part of the equalized county assessment rolls of the affected counties shall be the basis of assessment for the district when its assessments are levied pursuant to this article.

Section 26502. If any land subject to assessment for the purposes of the district does not appear upon a county assessment roll used as the basis of assessment for the district, the land omitted shall be forthwith assessed by the county assessor of the county in

which it is situated upon an order of the board of supervisors making the assessment, and a description of the property omitted shall be written in the roll prepared for the district assessments.

Section 26503. The board of supervisors shall meet and equalize each assessment made pursuant to this article with the assessment of other land in the district. The same notice shall be given by the board of supervisors of a meeting for the purpose of equalizing the assessment to be made as herein directed as is provided to be given by a district secretary when a board is to meet to equalize assessments.

Section 26504. All expenses incurred in levying the assessment shall be borne by the district concerned. Unless the expenses are paid within 60 days from the time when a demand for them is made, they shall be collected by an action commenced by the district attorney of the county whose board of supervisors prepared the assessment roll.

Section 26525. In case of the neglect or refusal of the collector of any district to perform the duties imposed upon him, the tax collector of the office county shall perform his duties and be accountable therefor upon his official bond.

Section 26526. When any county tax collector collects any assessments for any district, he shall pay the proceeds to the county treasurer of the office county.

Section 26527. As to money collected by the county tax collector and paid to the county treasurer, the county treasurer shall perform the duties ordinarily

imposed on the treasurer of a district and be accountable therefor upon his official bond.

Section 26528. The county treasurer shall place the money of the district in a special fund to the credit of the district and shall disburse it to the proper persons for the purposes for which the assessments raising it were levied.

Section 26529. The county treasurer shall not pay any part of the money to the treasurer of the district until the county treasurer is satisfied that all of the valid obligations for which the assessments were levied and for which payment has been demanded have been paid.

Section 26550. The district attorney of each office county shall ascertain each year whether the duties relating to the levying and collection of assessments in districts have been performed or not, and if he learns that the board or any official of any district has neglected or refused to perform any of these duties, he shall notify the board of supervisors or the county official required to perform the duty in the circumstances.

Section 26551. Unless the board of supervisors or county official proceeds to perform the duties he has been notified to perform within 30 days after the receipt of notice, the district attorney shall take action in court to compel performance.

Section 26552. The district attorney shall give notice to other officials and take any action necessary to secure the performance in their proper sequence of

subsequent duties relating to the levying and collection of assessments.

Section 26553. For the enforcement of the levying and collection of any assessment required to be levied and collected for the payment of any debt incurred, when complaint is made to the Attorney General that the district attorney of any county has not performed any duty devolving upon him by the provisions of this article or is not proceeding with due diligence or in the proper manner in the performance of the duty, the Attorney General shall make an investigation. If he finds the charge to be true, the Attorney General shall take any action necessary to enforce the performance of the duties relating to the levying and collection of assessments.